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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
Appellant,

vs.

SEAGRAM-DISTILLERS CORPORATION,
Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

This appeal attacks the constitutionality of Section 2 of the Illinois Fair Trade Act on the grounds that it deprived the defendant* of its liberty and property without due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment. The judgment of the Supreme Court of Illinois appealed from, (363 Ill. 610, R. 105) affirmed a decree permanently enjoining defendant from wilfully and knowingly advertising, offering for sale or selling certain whiskies below the prices stipulated by plaintiff in accordance with contracts executed pursuant to the Illinois Fair Trade Act. (R. 13). The court had previously disposed of certain contentions made against the validity of the Act in *Triner Corporation* v. *McNeil,* 363 Ill. 559 (R. 86).

* For the convenience of the Court, the parties will be referred to as plaintiff and defendant.

Statute Involved.

The Illinois Fair Trade Act (Laws of Illinois 1935, p. 1436, Ill. State Bar Stats. 1935, Ch. 140, Par. 8, effective July 8, 1935), is as follows:

AN ACT to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* that such stock is first offered to the manufacturer of such stock at the origi-

nal invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

SECTION 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SECTION 4. This Act may be known and cited as the "Fair Trade Act."

Statement of the case.

Plaintiff, a Delaware corporation, is in the business of buying and selling solely at wholesale, alcoholic beverages which it does not manufacture but buys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations (R. 37). These beverages are of standard quality and are in free and open competition with commodities of the same general class which are produced by others and which are sold and distributed in Illinois, and they are sold by plaintiff under the trade-marks, brands and names of the producers. Plaintiff does not sell to retailers but all of its sales are confined to wholesale distributors (R. 34, 35). Plaintiff has never sold any of the products in controversy to the defendant but has sold other liquors

to it as a wholesaler (R. 36-39). Plaintiff has expended large sums of money in building up its good will and in advertising these products in Illinois (R. 35). Defendant is an Illinois corporation operating four retail liquor stores in Chicago and is also engaged in the wholesale liquor business (R. 36, 39).

Shortly after July 8, 1935, (the effective date of the Illinois Fair Trade Act), the plaintiff formulated and established a system of resale price maintenance under the Act. Before the middle of October, 1935, plaintiff entered into Fair Trade contracts with all of the Illinois distributors to whom it was then selling Seagram products at wholesale, and also executed Fair Trade contracts with numerous Illinois retailers although it has not sold and does not sell said beverages to any retailer (R. 36). One of such retailers' contracts was executed by plaintiff and signed by defendant's secretary and treasurer on August 14, 1935 (R. 46-47). This officer was also a director of the defendant and "had full charge" of defendant's purchases (R. 54).

Both the distributors' (R. 17) and the retailers' (R. 15) contracts contain provisions that said products shall not be sold, advertised or offered for sale in Illinois below the prices to be stipulated by plaintiff. The retailers' contracts recite that plaintiff has executed contracts with its distributors, wherein the distributors "have agreed not to sell within the State of Illinois any of said beverages to any Retailer in Illinois unless and until said Retailer shall have executed a contract similar to this contract". They further recite that it is the desire of plaintiff and the retailer "to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illi-

nois, for the purpose of insuring a fair return to those engaged in the sale thereof." The parties in the retailers' contracts agree that "the minimum sales prices of such beverages by Retailer to Consumers will be in accordance with written schedules thereof, furnished from time to time to Retailer by Owner (the plaintiff), or distributor of Owner, which schedules are to be considered a part of this contract." The plaintiff entered into additional Fair Trade contracts after the execution of the contract with defendant on August 14, 1935 (R. 68). Since the middle of October, 1935, all of the said beverages which plaintiff has sold in Illinois have been subject to one or more of these Fair Trade contracts (R. 36).

Plaintiff distributed written schedules (R. 22A) of its minimum prices to its distributors and to the retailers who executed Fair Trade contracts. The defendant received one of them before November 16, 1935, accompanied by a written demand, dated November 5, 1935, to comply with plaintiff's Fair Trade contracts (R. 44, 68).

Defendant admits in its answer that on the 13th, 15th and 16th of November, 1935, it advertised, offered for sale and sold certain of said Seagram products at retail below said minimum prices (R. 8). On November 16, 1935, when two of plaintiff's representatives again demanded of defendant that it comply with its Fair Trade contract and with plaintiff's other Fair Trade contracts, and delivered to it additional copies of plaintiff's schedule and written demand of November 5, 1935, defendant advised plaintiff that the defendant would not comply with said contracts. Defendant then threatened that it would,

and on November 18, 1935, it did, and thereafter it continued to wilfully and knowingly advertise, offer for sale and sell said beverages at prices below those stipulated by plaintiff, in violation of its Fair Trade contract with plaintiff and plaintiff's other Fair Trade contracts provided for in defendant's contract (R. 43, 67). The beverages which defendant acquired from distributors who had signed Fair Trade contracts with plaintiff were purchased by defendant at prices below the minimum wholesale prices stipulated in plaintiff's schedule in violation of the contracts of said distributors, and defendant was a party to breaches of said contracts (R. 51, 54, 106).

On November 19, 1935, plaintiff notified defendant that the verified complaint herein (R. 1) had been filed, and on November 20, 1935 plaintiff made a motion for a temporary injunction. Defendant refused to discontinue wilfully and knowingly violating said Fair Trade contracts (R. 23, 24). The trial court gave defendant leave to answer immediately and set the matter for the next day. On November 21, 1935 defendant filed its answer (R. 7) and a trial on the merits proceeded. Plaintiff's reply was filed on November 22 (R. 12). The defendant continued throughout the trial, which lasted until November 30, 1935, to wilfully and knowingly violate said Fair Trade contracts (R. 69). Defendant publicized its price cutting by pasting advertising posters on the window of its store at 208 West Madison Street, R. 69) and by advertising in the daily press (R. 70A).

The defendant's price cutting resulted directly in consumers questioning the quality of Seagram products (R. 40), in numerous retailers threatening to discontinue dealing in said beverages if defendant

continued cutting prices (R. 71), in retailers dealing in Seagram products concealing the same from customers (R. 48), in retailers cutting prices on Seagram products in order to meet defendant's prices (R. 36, 48-51), and in causing a practical stoppage of plaintiff's sales and a complete demoralization of plaintiff's distribution of Seagram products in Chicago (R. 40, 77-85).

Appellee's (Plaintiff's) contentions.

Plaintiff contended in the trial court and in the Supreme Court of Illinois that the August 14, 1935 Fair Trade contract between plaintiff and defendant was valid and binding on defendant; that it was executed in accordance with Section 1 of the Illinois Fair Trade Act, a distinct and separable portion of the statute which can be applied wholly independently of Section 2; that Section 1 of said Act was unquestionably constitutional; and that plaintiff was entitled to the injunction because of the irreparable injury which it was suffering on account of defendant's continuing violations of its contract; and plaintiff further contended that Section 2 of the Act was constitutional as applied to the facts in this case, and that it was entitled to the injunction irrespective of the validity of defendant's contract of August 14, 1935.

The Supreme Court of Illinois did not find it necessary to pass on plaintiff's contentions that it had a valid and binding contract with the defendant under Section 1 of the Act * notwithstanding defend-

* It should be noted, however, that the Supreme Court of Illinois in the present case recognized that resale price maintenance contracts were valid as between the parties thereto even prior to the enactment of the Fair Trade Act (363 Ill. 610, R. 108). See also *Triner Corporation* v. *McNeil*, 363 Ill. 559, 580 (R. 103).

ant's claim that it was improperly executed and lacking in mutuality, and that the plaintiff was entitled to equitable relief regardless of the validity of Section 2 of the Act. These contentions, upon which the Supreme Court of Illinois failed to pass, involved, as is apparent, questions which are non-federal in their nature and which, under the decisions of this Court, cannot be decided on this appeal. Plaintiff's argument on this appeal is therefore restricted to the contention that Section 2 of the Fair Trade Act is constitutional as applied to the facts in this case and any decision on this appeal, if adverse to the plaintiff, must necessarily be without prejudice to the plaintiff's right to urge in subsequent proceedings in support of the trial court's decree the contentions upon which the Supreme Court of Illinois failed to pass.

SUMMARY OF ARGUMENT.

I.

The Illinois Fair Trade Act which is substantially identical with Fair Trade acts adopted in thirteen other states, provides for the use of resale price maintenance contracts for the purpose of protecting trade-mark owners, distributors and the public against the harmful results of price-cutting of articles of standard quality which are in free and open competition with other commodities of the same general class, and are sold under a trade-mark, brand or name. Whether price cutting is an economic evil which should be controlled by resale price maintenance contracts is a controversial economic question. The Illinois legislature has finally resolved the controversy in that state by sanctioning the use of such contracts, and its judgment upon this subject is conclusive.

II.

Defendant cannot base its attack upon the constitutionality of the Act upon imaginary and hypothetical situations, but is limited in its attack to the facts in this case.

The authorities relied upon by defendant to the effect that price-fixing of commodities is unconstitutional are inapplicable. Defendant's further contention that the Act is a delegation of legislative authority is without merit.

The Fair Trade contracts to which Seagram

products have been and are subjected, impose equitable servitudes, upon the use of the Seagram name in connection with the sale of Seagram products as provided for by the Fair Trade Act. Since defendant acquired the goods in question subject to such restrictions, defendant cannot complain that it is deprived of liberty or property. The courts, in analogous situations, have enforced restrictions against persons acquiring property with notice thereof. The Fair Trade Act, in so providing, is clearly constitutional.

Defendant can claim no violation of the due process clause because of any change which the Act may have made in the pre-existing law, or because the Act imposes new liabilities. The principles applied in the numerous decisions of this court sustaining the validity of statutes involving the exercise of the police power and curtailing liberty and property rights to a greater extent than the defendant claims the Fair Trade Act interferes with its liberty of contract and property rights, support the validity of the Act. Defendant's argument that the Act is unconstitutional since it inures to the benefit of producers and distributors of articles bearing a trade-mark, brand or name, is without merit.

The only remedy provided for by the Act is judicial relief and in view of the fact that the relief provided for is similar to that granted by the courts even in the absence of statute, in cases enforcing equitable servitudes on property, in cases granting equitable relief against interference with contract relations, and in unfair competition cases, it is clear that the Act is not unreasonable or arbitrary and that it is reasonably designed to accomplish its purpose.

III.

Defendant can not in this case assail the validity of the Act as a violation of the equal protection clause because of any discrimination in favor of owners or distributors of articles under a trade-mark, brand or name, as against owners or distributors of articles not sold under such trade-mark, brand or name. The Act is available to all who choose to bring themselves within its scope, and the classification attacked is just and reasonable.

ARGUMENT.

I.

The purpose and nature of the Fair Trade Act.

The purpose of the Act as expressed in its title is "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." The Act recognizes that the trade-mark, brand or name under which an article is sold is a valuable property right.

The means adopted by the Act to accomplish such protection is to permit the use of resale price maintenance contracts in order to control the evils of price-cutting of such articles in the course of their distribution from the manufacturer or producer to the ultimate consumer. This type of resale price maintenance is commonly referred to as "vertical" —being confined to the maintenance of uniform selling prices for a particular commodity from the producer through the wholesaler and retailer to the consumer, and preventing a producer or manufacturer from being forced to compete with himself or his distributors in the sale of a particular commodity. The term "horizontal" resale price maintenance is commonly used to refer to price maintenance agreements between the sellers of rival commodities, whether they be producers, wholesalers or retailers, and such agreements are expressly prohibited by the Act.

Section 1 of the Fair Trade Act expressly legalizes "vertical" resale price maintenance contracts be-

tween the parties, with the proviso that such commodities may be sold free of any contractual restrictions prohibiting price-cutting if they are being closed out for the purpose of discontinuing delivery, if they are damaged or deteriorated in quality, and notice thereof is given to the public, or if they are sold by any officer acting under the orders of any court.

It was conceded in the cases involving the validity of Fair Trade Acts in other states that the section corresponding to Section 1 of the Illinois Act is constitutional and the courts which have decided that the section of the Act corresponding to Section 2 of the Illinois Act is unconstitutional under the facts in the cases before them have expressly recognized the validity of provisions similar to Section 1. *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, 411, 103 A. L. R. 1325 (1936); affirming 158 Misc. 267, 284 N. Y. S. 533 (1935); *Coty, Inc.* v. *Hearn Department Stores Inc.*, 158 Misc. 516, 284 N. Y. S. 909 (1935); See also opinions of dissenting judges in *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d) 177 (1936), and *Pyroil Sales Company, Inc.* v. *The Pep Boys, Inc.*, 5 Cal. (2d) 784, 55 Pac. (2d) 194 (1936).

Section 2 makes such contracts binding upon persons other than the parties thereto, upon the conditions prescribed in said section. Section 3 provides that the Act shall not legalize contracts for "horizontal" price maintenance as to competing articles.

The right to fix resale prices is limited and confined to commodities (1) of standard quality in fair and open competition with commodities of the same general class, produced by others; and (2) bearing and sold under, trade-marks, brands or names. These limitations insure the continuance of the operation

of normal laws of competition between rival articles and prevent the Act from being used as a means of creating or fostering monopolies.

The legislatures of many states have recognized the economic evils of price-cutting. The first statute of the type commonly designated as a "Fair Trade Act" was enacted in California in 1931,[1] and contained a provision substantially identical to Section 1 of the Illinois Fair Trade Act. Subsequently, in 1933, the California legislature amended this Fair Trade Act by adding a provision which is substantially identical with Section 2 of the Illinois Act. Substantially similar statutes have since been enacted in twelve other states.[2] This widespread adoption of the Act is indicative of the general recognition of the injurious effect of price-cutting, and is evidence of the reasonableness of the method invoked to curb it. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 161 (1912).

Whether price cutting is an economic evil which should be controlled by resale price maintenance contracts is an economic question, *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 27, concurring opinion of Mr. Justice Brandeis (1918), *North-*

1. California—Chap. 278, Laws of 1931, amended by Chap. 260, Laws of 1933.
2. Iowa—S. B. 222, Laws of 1935.
Louisiana Act No. 13 Approved June 26, 1936.
Maryland—Chap. 212 Laws of 1935.
New Jersey—Chap. 58 Laws of 1935.
New York—Chap. 976, Laws of 1935.
Ohio—H. 609X approved April 7, 1936.
Oregon—Chap. 295, Laws of 1935.
Pennsylvania—Act No. 115, Acts of 1935.
Rhode Island—S. B. No. 180, approved May 5, 1936.
Virginia—S. B. No. 126, approved March 27, 1936.
Washington—Chap. 177, Laws of 1935.
Wisconsin—Chap. 52, Laws of 1935.

ern Securities Co. v. *United States,* 193 U. S. 197, 337 (1904). This question has been the subject-matter of economic controversy for many years and has on numerous occasions been brought to the attention of the courts.[1] In enacting the Fair Trade Act the Illinois legislature has finally resolved that controversy in Illinois by determining that price-cutting is an uneconomic and injurious practice and that the use of resale price maintenance contracts is a proper means of controlling it. We therefore refrain from a discussion of the many arguments for and against the use of resale price maintenance contracts as a means of controlling price-cutting since the judgment of the legislature upon this subject is conclusive. *Nebbia* v. *New York*, 291 U. S. 502, 537 (1934); *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 413 (1914); *Tanner* v. *Little,* 240 U. S. 369, 385 (1916). It is to be observed that the federal cases holding resale price maintenance contracts invalid in the absence of statute, recognized that the evil of price-cutting was one which could be controlled by legislation. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373, 405 (1911); *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 26 (1918); *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 350 (1908); *Bauer* v. *O'Donnell,* 229 U. S. 1, 12 (1913); *John D. Park & Sons Co.* v. *Hartman,* 153 Fed. 24, 46 (C. C. A. 6, 1907).

1. See references to literature on the subject. Appendix, p. 35, *infra.*

II.

The Illinois Fair Trade Act does not violate the due process clause of the Fourteenth Amendment.

1. The constitutionality of the Act is to be tested by the facts in the case and not by imaginary and hypothetical situations assumed by the defendant.

Defendant claims that the operation and effect of the statute is arbitrary, unreasonable and capricious and has resulted in a deprivation of the defendant's liberty and property. The defendant cannot base its attack upon the constitutionality of the Act upon imaginary and hypothetical situations. A statute may be invalid as applied to one set of facts, yet valid as applied to another, and defendant is limited in its attack to the facts in this case. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289 (1921); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186 (1932); *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415 (1935); *New York ex rel Hatch* v. *Reardon*, 204 U. S. 152, 160 (1907); *Chicago Terre Haute & S. E. Ry. Co.* v. *Anderson*, 242 U. S. 283, 287 (1916); *Gorieb* v. *Fox*, 274 U. S. 603, 606 (1927); *Liberty Warehouse Co.* v. *Burley Tobacco Growers etc. Association*, 276 U. S. 71, 88 (1928).

At the outset we wish to stress the exact nature of the objections to the constitutionality of the Act to which the defendant is limited under the facts in this case. The defendant is free to cut prices on any Seagram products it may deal in, providing the Seagram name is not used in connection with their resale. The only liberty or property right of which the defendant can claim that it is deprived, is the

right to arbitrarily insist that it be permitted to continue to deal in Seagram products in an unlimited and unrestricted manner subsequent to the time when the plaintiff refuses to sell such products free of restrictions, regardless of any injury to the Seagram name and consequent injury to the plaintiff because of its interest in said name. Stated in another way, the defendant contends that it has an inherent right to deal in Seagram products free of all restrictions and that this right forbids the enactment of legislation permitting the plaintiff to impose binding restrictions on the products which it offers for sale.

2. The Act is not a "price-fixing" statute and does not delegate legislative power.

Defendant argues at great length that the Act is violative of the due process clause, citing authorities holding that price-fixing statutes are unconstitutional and also endeavors to distinguish *Nebbia* v. *New York*, 291 U. S. 502 (1934), which apparently departs from the principles enunciated in the decisions relied upon by defendant. Although we rely on certain of the general principles of constitutional law therein stated by Mr. Justice Roberts, we do not urge the actual holding in the *Nebbia* case as an authority for the constitutionality of the Fair Trade Act, as it is our contention that the statute before this court is not a price-fixing statute within the meaning of the foregoing decisions. The purpose of the statute is not price-fixing but it is designed to protect distributors and the public from the harm resulting from injurious practices in connection with the sale of articles under trade-marks, names and brands. The fundamental distinction

between the Fair Trade Act and the statutes involved in *Tyson* v. *Banton*, 273 U. S. 418 (1927); *Ribnik* v. *McBride*, 277 U. S. 350 (1928); *Williams* v. *Standard Oil Co.*, 278 U. S. 235 (1929), and the other so-called "price-fixing" cases is that the Fair Trade Act does not involve any governmental regulation of prices according to some artificial standard without regard to market factors, but on the contrary guarantees that normal competitive factors will remain operative. Seligman & Love, *Price Cutting and Price Maintenance* (1932) pp. 32, 33; 22 Virginia Law Review (1936), pp. 556, 560; 30 Illinois Law Review 638, 645-6 (1936); 36 Columbia Law Review 293, 301, footnote 42 (1936); 45 Yale Law Journal 672, 677-678 (1936); 13 New York University Law Quarterly Review 267, 278 (1936). The case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, (1927) relied on and referred to so frequently by defendant, is readily distinguishable from this case. The statute there involved, was designed to prevent the destruction of competition by overbidding and made it a crime for one purchasing dairy products to pay a higher price in one locality than he paid in another, completely disregarding any and all differences in competitive market conditions in the two localities, with the exception of differentials in the cost of transportation. In holding the statute invalid the court emphasized the fact that it disregarded "ordinary trade conditions."

Nor does the Fair Trade Act delegate legislative power. It was a complete statute at the time it was enacted, and was not in any way dependent upon the approval or disapproval of any individual. As in the case of many other statutes, however, it is conditional legislation which becomes operative and effective only

when the conditions therein prescribed are complied with. *Commonwealth* v. *Goldburg,* 167 Ky. 96, 180 S. W. 68 (1915); *Southern Pac. Co.* v. *U. S.,* 171 Fed. 360 (C. C. A. 9th, 1909); *United States* v. *Oregon R. & N. Co.,* 163 Fed. 642 (C. C. D. Oregon, 1908); *Samuelson* v. *State,* 116 Tenn. 470, 95 S. W. 1012 (1906); *In re Application of Thirty-Fourth Street Railroad Company,* 102 N. Y. 343, 7 N. E. 172, 176 (1886). Owners or distributors of articles covered by the Act are not required to operate under it. Retailers are not compelled to deal in articles which are subjected to contracts entered into pursuant to the Act. They can deal in such articles free of any restrictions if they do not make use of the trade-mark, brand or name in connection with their resale. The Act does not provide that "One set of owners determine not only the extent of use, but the kind of use which another set of owners may make of their property" as in *Eubank* v. *Richmond,* 226 U. S. 137 (1912) and *Washington* v. *Roberge,* 278 U. S. 116 (1927), relied on by defendant, but merely permits persons to impose restrictions upon the use of names under which articles are sold so that purchasers acquire only a limited right to the use of such names.

3. The Act does not deprive defendant of its liberty or property.

The testimony shows that plaintiff sells the products in controversy in the State of Illinois solely through its wholesale distributors, and that all of these distributors have signed Fair Trade contracts with the plaintiff (R. 36); that the validity of these distributors' contracts is undisputed; that on or before August 14, 1935, the date defendant signed its

contract with plaintiff (R. 46), it had full knowledge of plaintiff's system of distribution, including the nature and provisions of plaintiff's contracts with its distributors and retailers; that defendant knew when it purchased the Seagram products which it dealt in, that they were sold by wholesale distributors who had executed plaintiff's Fair Trade contracts (R. 51, 52). Furthermore, the defendant, in order to attempt to prove that it was not selling Seagram products below cost,* disclosed its participation with certain of plaintiff's distributors in breaches of their distributors' contracts with plaintiff, by showing that it purchased such merchandise from them at prices lower than plaintiff's stipulated wholesale prices (R. 54, 106). It is therefore clear that the Seagram products which the defendant dealt in had been specifically subjected to the express restrictions specified in said Fair Trade contracts.

Under the facts in this case it is clear that plaintiff's contracts with its distributors and with retailers, created and constituted "equitable servitudes" upon the use of the Seagram names, brands and trade marks, in connection with the sale of Seagram products. The question thus presented is whether a statute recognizing the validity of a contract imposing restrictions upon personal property and making them binding upon third persons acquiring such property with notice thereof, is unconstitutional as depriving such persons of property without due process of law.

We again call attention to the fact that the federal

* The cost testified to apparently does not include overhead, operating expenses or other items properly chargeable thereto, but refers only to the actual amounts paid for the merchandise in question.

cases which defendant cites, holding resale price maintenance contracts invalid, recognized the power of the legislature to legalize such contracts and to make them effective as against third persons with notice thereof. (p. 15, *supra.*) However, even in the absence of statute, courts have recognized the validity of equitable servitudes on personal property similar to those in this case and have granted equitable relief against third persons acquiring the property with notice thereof. A recent recognition of the foregoing principle is found in *In re Waterson Berlin & Snyder Co.,* 48 Fed. (2d) 704 (C. C. A. 2-1931). In holding that an assignee of a copyright was subject to a royalty agreement in favor of the copyright owner, the court stated (708):

> "Courts in the United States have enforced rights resembling an equitable servitude binding on a third party who has acquired personal property from one who is under a contract to use it for a particular purpose or in a particular way." (Citing numerous authorities.)

In *Murphy* v. *Christian Press Ass'n Pub. Co.,* 38 App. Div. 426, 56 N. Y. S. 597 (1899), cited in the *Waterson* case, the court enjoined the defendant from selling books at prices lower than those stipulated in an agreement between plaintiffs and The Catholic Publication Society from whom defendant acquired the books.

In *Hartman* v. *John D. Park & Sons Co.,* 145 Fed. 358 (C. C. Ky. 1906), reversed 153 Fed. 24, *supra,* Cochran, J., suggested (p. 387), the possibility of applying the doctrine of *Tulk* v. *Moxhay,* 2 Phillips 774 (1848), 41 Eng. Rep. 1143, where a covenant restricting the use of land was held enforcible in equity as against a third person acquiring the property with

general class produced by others. It is not a penal statute. It provides for no punishment or fine. It deprives no price cutter of a day in court. On the contrary, it merely defines price cutting where the manufacturer or producer has fixed a retail price, to be unfair competition and actionable in the courts of the land at the instance of a person damaged thereby. If no damage is shown, no remedy can be had. If the commodity sold is a commodity which is not in competition with commodities of the same general class, the statute is not operative. The Act does not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale prices. Such agreements may still be unlawful. Under the pro- [fol. 2-48] tection of judicial proceedings, the respective rights of the parties are to be determined. This, of course, contemplates a time and a place fixed by law and a judicial determination of the facts necessary to be shown before complainants are granted rights and remedies and defendants charged with obligations and burdens.

It has been contended upon argument that the word "actionable" in the Statute is to be concerned only as granting a remedy at law for damages and that the Statute did not contemplate a remedy in equity by way of injunction. It is clear that the word "actionable" as used in the Statute contemplated actions both in law and equity at the instance of any party aggrieved by the unfair competition denounced in the Act. The legislature in the new Practice Act, effective January 1, 1934, defined the word "action" as used in that Statute to mean proceedings both in law and in equity. A proper construction of the Act in question demands that the word "actionable" be given that meaning which the legislature had already given it in prior legislation.

Paraphrasing the language of Justice Holmes in his dissenting opinion in the Tyson Case, supra, I am far from saying that I think this particular law is a wise and rational provision. That is not my affair. But if the people of the State of Illinois speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States or the Constitution of the State of Illinois to prevent their having their will and as was said by the learned Justice Stone in the same case, "For me the question is one of power and not of expediency."

[fol. 2-49] The motion of the defendant, Carl W. McNeil, to dismiss the bill of complaint and to dissolve the injunction, is denied.

Certificate of Judge, authenticating report of proceedings at trial.

Stipulation to incorporate original copy of the report of proceedings at the trial in the record on appeal.

Certificate of clerk of the Circuit Court of Cook County that the record is a true, perfect and complete transcript of record in his office in said case.

Respectfully submitted, J. Herzl Segal, Attorney for Appellant.

[fols. 3 & 4] IN SUPREME COURT OF ILLINOIS

ERRORS RELIED UPON FOR REVERSAL

1. The trial court erred in overruling the motion of the defendant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law.

2. The trial court erred in not sustaining said motion of the defendant for a decree dismissing the complaint.

3. The decree entered by the trial court is contrary to law.

4. The decree entered by the trial court is in violation of the Federal and State constitutions in that it grants relief upon a complaint brought under a statute which violates said constitutions in the respects set forth in defendant's motion for a decree dismissing the complaint.

5. The trial court erred in not adjudging the Fair Trade Act to be unconstitutional and void.

6. The trial court erred in not dismissing the complaint for want of equity.

[fol. 5] IN SUPREME COURT OF ILLINOIS, APRIL TERM, 1936

Agenda 27

Docket 23475

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. McNEIL, Doing Business as McNeil's Liquor Store, Appellant

Appeal from the Circuit Court of Cook County

OPINION—Filed June 10, 1936

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act, approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." Section 1 provides: "Sec. 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

[fol. 6] "Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may

be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2 which declares that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. The Fair Trade act thus permits vertical resale price maintenance but condemns, as do the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representa- [fol. 7] tive in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products and the name has been duly registered as a trademark with the United States patent office. Affixed to each bottle of "Old Quaker" is a distinctive label upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt

and three barrels marked "Old Quaker Whiskey." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whiskey. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company." The whiskey has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is retailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half point. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising "Old Quaker", as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for "Old Quaker" and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such dis- [fol. 8] tributor. The distributors, in turn, refuse to sell "Old Quaker", or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end, the plaintiff and the other local distributors make all sales of "Old Quaker" or other Schenley products under agreements of sale denominated "Fair Trade Agreements", which expressly provide that the retailer will not resell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for "Old Quaker" and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city

various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributors, Inc., sought to maintain the prices specified in the fair trade agreements."

[fol. 9] The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price, and at a loss or scant return to themselves for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands, but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at wholesale "Old Quaker" and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for resale in the city the various brands of Schenley products, including "Old Quaker". Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint, a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell,

offer for sale and advertise for sale at retail, a quantity of "Old Quaker" at a price appreciably below the uniform [fol. 10] Schenley retail price for the brand stipulated in the contracts. On October 16, the plaintiff informed the defendant of its trade policy in maintaining a uniform price for "Old Quaker" and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of "Old Quaker". The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions, the defendant offered for sale and sold large quantities of "Old Quaker" at 77 cents per pint, or more than twenty per cent below the Schenley uniform retail price. Defendant was again urged to desist but refused. On November 8, 1935, he advertised "Old Quaker" for sale at 77 cents per pint.

None of the quantity advertised or sold by the defendant at the cut-price was offered for sale or sold in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time "Old Quaker" was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

[fol. 11] The plaintiff charged that as a consequence of the defendant's conduct, a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a fair and reasonable profit, and that when the public requested "Old

Quaker" some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are that if the defendant continues his practice, the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed Fair Trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that "Old Quaker" is not worth the uniform retail price and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trade-marks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products, and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices. The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

[fol. 12] The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and over-ruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail "Old Quaker" whiskey at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety, but also for the promotion of the general welfare. Fenske Bros. v. Upholsterers Union, 358 Ill. 239; City of Aurora v. Burns, [fol. 13] 319 id. 84. The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (Public Utilities Com. v. City of Quincy, 290 Ill. 360. The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in Noble State Bank v. Haskell, 219 U. S. 104: 'It may be said in a general way that the police power extends to all the great public needs. (Camfield v. United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'"

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stats. 1935, p. 1201). It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article, sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his

distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he [fol. 14] has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests", observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix resale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we can not help but note that many of the present legislative enactments such as the Fair Trade acts of New York, California and Illinois are resultants brought about because of the failure of the public and, particularly, the business public to observe those ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship, nor in keeping with the best tra- [fol. 15] ditions of the law merchant as known at the common law. If public opinion can not check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these practices by protecting the manufacturer who has built up a brand or article based on quality and excellence, and preventing its use as a "loss leader" by those who would sell it

for the purpose only of inveigling the public into patronizing their places of business in the hope of obtaining a profit on other goods of inferior quality. In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; People v. Rosehill Cemetery Co., 334 id. 556; Condon v. Village of Forest Park, 278 id. 218; People v. Steele, 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago. Robt. H. Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in [fol. 16] 1916 declared it unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good will of any maker in whose product they dealt, or to discriminate against it by depreciating the value of the products in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of the firm for fair dealing and reliable products was

nation wide; that it was absolutely necessary as a part of the advertising and building up of the business that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer, who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor, in his opinion, said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, [fol. 17] guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expressed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes."

The injunction granted the complainant was subsequently made permanent in Robt. H. Ingersoll & Bro. v. Hahne & Co., 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that even in the absence of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. * * * In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a resale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a resale of the article, nor is it impracticable to resell the article without reference to the trade-name. * * * Complainant does not seek to retain any right in

the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees [fol. 18] fit. * * * It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of Nebbia v. New York, 291 U. S. 502, that because the Milk-Control law of New York essayed to control prices it denied due process. The Supreme Court of the United States in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U. S. 113."

The court reviewed numerous decisions (German Alliance Insurance Co. v. Lewis, 233 U. S. 389; Griffith v. Connecticut, 218 id. 563; O'Gorman & Young v. Hartford Fire Ins. Co., 282 id. 251; Frisbie v. United States, 157 id. 160; Yeiser v. Dysart, 267 id. 540; Cotting v. Kansas City Stockyards Co., 183 id. 792 and Stephenson v. Binford, 287 id. 251;) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of gov- [fol. 19] ernmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for

the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and affect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade act, identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth in the complaint. The articles in question were books. The Doubleday books are not commodities within the accepted meaning of the term. Each book rests upon its own merit and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other [fol. 20] fact situations. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282. The court, in Max Factor & Co. v. Kunsman, supra, distinguished the Doubleday, Doran & Co. decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co., Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*'

Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company.

Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods within restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the [fol. 21] factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons, and grants

to such persons special privileges and immunities in contravention of the constitutional guaranties invoked. He asserts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may under certain circumstances fix the resale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no national basis for denying to the vendors and vendees of commodities not bearing such [fol. 22] trade-mark symbols the right to fix the resale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. Nebbia v. New York, supra; Power Manufacturing Co. v. Saunders, 274 U. S. 490; Lindsley v. Natural Carbonic Gas Co., 220 id. 61; Magoun v. Illinois Trust and Savings Bank, 170 id. 283; Mich. Millers Ins. Co. v. McDonough, 358 Ill. 575; Stewart v. Brady, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. Mich. Millers Ins. Co. v. McDonough, supra; Jones v.

[fol. 23] Chicago, Rock Island and Pacific Railway Co. 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½ of which corresponds to the Fair Trade act of our State, Max Factor & Co. v. Kunsman, supra, said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to nontrade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The Anti-Trust act expresses the public policy of the State against trusts and combinations, organized for the purpose of suppressing competition and creating monopoly. Harding v. American Glucose Co. 182 Ill. 551; The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be resold, irrespective of whether resold under the trade-mark. It permits restrictions to be placed on the use of trade-marks, names and brands, not restrictions on the price of commodities generally, except, as the plaintiff contends, to the extent that new commodities may become involved [fol. 24] in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cuting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store and thereby induces the visitors to

become purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name, "Old Quaker", by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only resale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold to the consumer. Section 1 specifically provides that a commodity in order to be subject to the contracts permitted under the Fair Trade act must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or [fol. 25] resale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. Robert H. Ingersoll & Bro. v. Hahne & Co. supra; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144. Application of section 2 of the statute to the facts discloses that "Old Quaker" whiskey is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whiskey at a lower price than the standard price for "Old Quaker." The statute merely prevents him from filching the good will associated with the descriptive mark and name of "Old Quaker" for his own ulterier purposes.

Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated

Section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession, by any junk dealer of receptacles bearing registered trade marks prima facie evidence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6 which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles [fol. 26] described in the first section which had passed from the possession of their owners to others, and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act, has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal such as the summary recovery of certain types of personal property. The Horwich case, it is true, dealt with trade-marks but solely in their character as indicia of ownership. In the present case, the statute attacked deals not only with trade-marks in that respect but also with the good will built up by a producer or distributor around a trade-mark, trade name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination, should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the

sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repug- [fol. 27] nant to the provisions of the fourteenth amendment respecting the equal protection of the laws. The defendant argues that no distinction can be drawn between the classification condemned in the Connolly case and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification in flagrant violation of the constitutional guarantee of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly prohibited from removing the trade symbol and selling the whiskey, which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. Champlin Refining Co. v. Commission, 286 U. S. 210; Parks v. Libby-Owens- [fol. 28] Ford Glass Co., 360 Ill. 130. On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. People v. Huls, 355 Ill. 412. Furthermore, the legislature is not required to define words in common and daily use. People v. Lloyd, 304 Ill. 23. A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497; Omaechevarria v.

Idaho, 246 id. 343; People v. Mueller, 352 Ill. 124; Amberson v. Amberson, 349 id. 249; Kowalczyk v. Swift & Co., 329 id. 308. In the light of these authorities the following words and expressions segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "articles of standard quality" employed only in the title, the phrase "in fair and open competition" in section 1, the words "any commodity" and the expression "any contract entered into pursuant to the provisions of section 1" in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention and the argument supporting it rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act, the Supreme Court of that State, observed that the statute did not merely prohibit price-[fol. 29] cutting for the purpose of regulating prices but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. Max Factor & Co. v. Kunsman, supra. The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that resale price maintenance laws such as the Fair Trade acts of California, New York and Illinois constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the

legislative branch of our State government. Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68. When the Fair Trade act was passed by the General Assembly it was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree Affirmed.

[fol. 30] IN SUPREME COURT OF ILLINOIS

No. 23475

JOSEPH TRINER CORPORATION, a Corporation, Appellee,

vs.

CARL W. McNEIL, Doing Business as McNeil's Liquor Store, Appellant

Appeal from Circuit Court, Cook

JUDGMENT—June 10, 1936

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court of Cook County aforesaid, be Affirmed

in all things and stand in full force and effect, notwithstand- [fol. 31] ing the said matter and things therein assigned for error.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant its costs by it in this behalf expended and that it have execution therefor.

[fol. 32] IN SUPREME COURT OF ILLINOIS

[Title omitted]

MINUTE ENTRY OF SUBMISSION—April 21, 1936

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions, being taken for advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by J. Herzl Segal for appellant and [fols. 33 & 34] by Hamilton Moses for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 35] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 4, 1936

To the Honorable Lott R. Herrick, Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, Carl W. McNeil, doing business as McNeil's Liquor Store, respectfully shows:

(1) Your petitioner is the appellant in the above entitled cause.

(2) On November 8, 1935 the appellee and plaintiff, Joseph Triner Corporation, filed its complaint in the Circuit Court of Cook County seeking an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell, or selling whiskey below a uniform price established by the plaintiff in contracts with various third parties other than the defendant, pursuant to the Illinois Fair Trade Act (Smith-Hurd Revised Statutes, 1935, Chapter 121½, Section 188, et seq; Illinois State Bar Statutes, 1935, Chapter 140, Section 8, et seq.). Upon the application of the plaintiff, an order was entered on November 16, 1935 directing the issuance of a temporary injunction. [fol. 36] Thereafter on November 18, 1935 the defendant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law. The motion to dismiss challenged the constitutionality of the Fair Trade Act on the grounds that it violates the Federal Constitution (Rec. 34-41; Abst. 29-34) in that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States since its provisions, terms and language are so incomplete, vague, indefinite and uncertain that said Act does not express clearly or intelligently the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and it deprives the defendant and persons similarly situated of vested rights in articles and commodities owned by him, and it provides for arbitrary, discriminatory, unreasonable and unjust classification of persons. In and by said motion to dismiss appellant further contended that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Contstitution of the United States by denying to appellant the equal protection of the laws in that it denies to appellant and persons similarly situated such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade-mark, brand or name of the producer or owner, and it denies to producers and owners of commodities not bearing such trademark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and

owners of commodities bearing such trade-mark, brand or name.

The trial court held the statute constitutional and overruled the motion for a decree dismissing the complaint for want of equity. Appellant elected to abide by his motion [fol. 37] to dismiss and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint. The validity of a statute being involved, the defendant appealed directly to the Supreme Court of Illinois.

Pursuant to the rules of the Supreme Court of Illinois no assignment of errors was filed by appellant, but in the brief and argument filed on behalf of appellant the errors relied upon for reversal were set out (Brief and Argument for Appellant, pages 7 and 8). Appellant assigned as error the action of the trial court in not sustaining said motion of the defendant for a decree dismissing the complaint and that the decree entered by the trial court is in violation of the Federal Constitution in that it grants relief upon a complaint brought under a statute which violates said Constitution in the respects set forth in the defendant's motion for a decree dismissing the complaint.

The Supreme Court of Illinois on June 10, 1936 affirmed the decree of the trial court. As appears from the opinion of the Supreme Court of Illinois (363 Ill. 559) the constitutional questions raised in the trial court were specifically and directly considered and passed upon. Thus on Page 567 the Court said:

"The contention is made that the Fair Trade Act violates the equal protection of the laws provision of the Fourteenth Amendment to the Federal Constitution, the due process causes of the Federal and State Constitutions, and also Section 12 of Article IV of the State Constitution."

Again on Page 569 the Court said:

"The defendant maintains that Section 2 of the Fair Trade Act arbitrarily deprives him of his right to determine the price at which he wil sell his commodities and in consequence violates the due process clauses of the Federal and State Constitutions."

[fol. 38] Also on Page 575 the Court said:

"The defendant argues, however, that the Fair Trade Act creates an arbitrary classification of persons and grants to such persons special privileges and immunities in contravention of the constitutional guaranties invoked."

By its decision the Supreme Court of Illinois overruled all of the foregoing objections raised by appellant and sustained the validity of the Fair Trade Act. No petition for rehearing was filed by your petitioner within the time required by the Rules of the Supreme Court of Illinois and said decision became final on said June 10, 1936. This application for the allowance of an appeal to the Supreme Court of the United States is being hereby made within three months after the entry of said decree by the Supreme Court of Illinois.

(3) The Supreme Court of the State of Illinois is the highest court of said State in which a decision in this suit can be had.

(4) In said cause there is drawn in question the validity of a statute on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity notwithstanding your petitioner's contention that said statute violates the Fourteenth Amendment to the Constitution of the United States.

(5) Therefore, in accordance with Section 237 (a) of the Judicial Code of the United States and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31, 1928 was passed, to-wit: under Section 237 (a) of the Judicial Code of the United States, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

[fol. 39] (6) The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States. There is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as pro-

vided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of Illinois, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final decree of said Supreme Court of the State of Illinois may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Illinois under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner and that the cost bond tendered by petitioner be approved.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Petitioner.

Dated August 26, 1936.

[fols. 39½ & 40] [File endorsement omitted.]

[fol. 41] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 4, 1936

Comes now the appellant, Carl W. McNeil, doing business as McNeil's Liquor Store, by Nicholas J. Pritzker, J. Herzl Segal and Stanford Clinton, his attorneys, and assigns the following errors on the record and proceedings in this cause:

1. The Supreme Court of Illinois erred in holding that said Fair Trade Act is a valid exercise of the police power.

2. The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Cook County, Illinois.

3. The Supreme Court of Illinois erred in refusing to reverse the decree of the said Circuit Court of Cook County, Illinois.

4. The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it deprives the appellant of property without due process of law in that (a) its provisions, terms and language are so incomplete, vague, indefinite and uncertain, particularly in the use of the words "articles of standard [fol. 42] quality", "commodities of the same general class", "in fair and open competition" and "any commodity", that said Act does not express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder; (b) it deprives the appellant and persons similarly situated of vested rights in articles and commodities owned by him; (c) it provides for arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being producers and owners of commodities bearing a trade-mark, brand or name of the producer or owner and the other class being producers and owners of commodities not bearing such trade-mark, brand or name; (d) it provides for an arbitrary, discriminatory, unreasonable and unjust classification of persons, one class being retailers of commodities bearing the trade-mark, brand or name of the producer or owner and the other class being retailers of commodities not bearing such trade-mark, brand or name; (e) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold.

5. The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it denies to appellant the equal protection of the laws in that (a) it denies to appellant and persons similarly situated such right to dispose of his commodities as is enjoyed by persons dealing in commodities not bearing the trade-mark, brand or name of the producer or owner; (b) it denies to producers and owners of commodities not bearing such trade-mark, brand or name the right to fix the resale price thereof as is sought to be conferred upon producers and owners of commodities bearing such trade-mark, brand or name; (c) it grants to vendors and [fol. 43] purchasers of commodities bearing a trade-mark,

brand or name of a producer and owner the special and exclusive privilege of fixing the resale price thereof, contrary to the volition of the appellant and persons similarly situated; (d) it grants to retailers of commodities not bearing such trade-mark, brand or name the special and exclusive privilege (which is denied to appellant and persons similarly situated) of selling the commodities owned by them at a price or prices not controlled by persons with whom they have no privity of contract; (e) it grants to vendors and purchasers of commodities bearing such trade-mark, brand or name a special and exclusive immunity (which is denied to appellant and persons similarly situated) from the penalties and punishments imposed by a certain law passed by the General Assembly of the State of Illinois, to wit: "An Act To Provide For The Punishment Of Persons, Copartners Or Corporations Forming Pools, Trusts And Combines, And Mode Of Procedure And Rules Of Evidence In Such Cases"; (f) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold and thus denies to appellant and persons similarly situated the equal right to have all legislative acts performed by the General Assembly of the State of Illinois.

Wherefore, on account of the errors hereinabove assigned, the appellant prays that said decree of the Supreme Court of the State of Illinois entered on the 10th day of June, 1936, be reversed and that the motion of appellant for a decree dismissing the complaint herein for want of equity be sustained and that a decree be entered in favor [fol. 44] of this appellant dismissing said complaint.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

[fols. 44½-58] [File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 4, 1936

The petition of Carl W. McNeil, doing business as McNeil's Liquor Store, the appellant in the above entitled cause, for an appeal in said cause to the Supreme Court of the United States from the decree of the Supreme Court of Illinois having been filed with the Clerk of this Court and presented herein accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered,

It is hereby ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final decree dated the 10th day of June, 1936 of the Supreme Court of the State of Illinois as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois shall within forty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of [fol. 60] the Supreme Court of the United States.

It is further ordered that said appellant shall give a good and sufficient cost bond in the sum of Two Hundred Fifty Dollars ($250.00), that said appellant shall prosecute said appeal to effect and answer all costs if he fail to make his plea good.

Comes now the appellant, Carl W. McNeil, doing business as McNeil's Liquor Store, and presents his cost bond conditioned in accordance with the foregoing order and in accordance with the Statutes of the United States of America, and the undersigned having examined the said bond and the sufficiency of the surety or sureties signing said bond, finds the same to be proper in all respects and has approved the same and hereby orders that the same is approved and shall be filed by the Clerk of this Court.

Entered this 26 day of August, 1936.

Lott R. Herrick, Chief Justice of the Supreme Court of the State of Illinois. (Seal.)

Attest: Adam F. Bloch, Clerk.

[fols. 60½ & 61] [File endorsement omitted.]

[fols. 62-67] Bond on Appeal for $250.00, approved and filed September 4, 1936, omitted in printing.

[fols. 68 & 69] Citation, in usual form, showing service on Moses, Kennedy, Stein & Bachrach, filed September 9, 1936, omitted in printing.

[fol. 70] Be it also Remembered, that to-wit, on the 9th day of September, A. D. 1936, there was filed in the office of the Clerk of the Supreme Court of Illinois appellant's Præcipe for Transcript of the Record, with proof of service thereof and endorsement by appellee as follows:

"The undersigned hereby certifies that the above and foregoing præcipe for transcript of the record is satisfactory to the appellee and the Clerk of the Supreme Court of Illinois is hereby directed to prepare the transcript in accordance with the foregoing.

Joseph Triner Corporation, a Corporation, Appellee, by Moses Kennedy Stein & Bachrach."

which said original Præcipe is in the words and figures as follows, to-wit:

[fol. 71] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANT'S PRÆCIPE FOR TRANSCRIPT OF THE RECORD—
Filed September 9, 1936

To Honorable Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois, Springfield, Illinois.

You will please prepare and certify a transcript of the following portions of the record in this cause:

(1) The printed abstract filed herein on January 15, 1936 of the complete record of the Circuit Court of Cook County, Illinois, in this cause.

(2) "Errors Relied Upon For Reversal" contained on Pages 7 and 8 of the brief and argument for appellant filed herein on January 15, 1936.

(3) Opinion of the Court filed herein on June 10, 1936.

(4) Judgment or decree, if any, entered herein.

(5) Petition for allowance of appeal to the Supreme Court of the United States filed on, to-wit, September 4, 1936.

(6) Assignment of errors filed on, to-wit, September 4, 1936.

(7) Statement of jurisdictional facts (required by Rule [fol. 72] 12 Paragraph 1 of the Rules of the Supreme Court of the United States) filed on, to-wit, September 4, 1936.

(8) Order dated August 26, 1936 signed by the Honorable Lott R. Herrick, Chief Justice of the Illinois Supreme Court, allowing the appeal to the Supreme Court of the United States and approving and ordering filed the appellant's cost bond.

(9) Cost bond aproved by the Honorable Lott R. Herrick, Chief Justice of the Illinois Supreme Court, on August 26, 1936.

(10) Notice by appellant to appellee dated August 30, 1936, directing appellee's attention to the provisions of Rule 12, Paragraph 3 of the Rules of the United States Supreme Court and proof of service of said notice and proof of service of the foregoing items Nos. 5, 6, 7 and 8 on Joseph Triner Corporation, a corporation, appellee.

(11) Citation to Joseph Triner Corporation, a corporation, appellee, dated August 26, 1936, returnable in forty (40) days, signed by the Chief Justice of the Supreme Court of Illinois and proof or acknowledgment of service of the citation upon the said appellee.

(12) A statement, if any, of appellee opposing the jurisdiction of the Supreme Court of the United States and a motion, if any, to dismiss or affirm, which appellee may file herein pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States within fifteen days after August 30, 1936, the date on which the appellee was served with copies of the foregoing items Nos. 5, 6, 7 and 8.

(13) This præcipe for record filed pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of

the United States, and the proof or acknowledgment of service thereof on appellee.

(14) Notice of filing this præcipe for record with proof or acknowledgment of service thereof on appellee.

[fol. 73] (15) Any additional præcipe filed by appellee pursuant to said Paragraph 2 of Rule 10 within ten (10) day of the filing of appellant's præcipe.

(16) All documents hereafter filed herein by either appellant or appellee, although not specified above.

(17) A certificate under your hand and the seal of the Supreme Court of Illinois that said transcript contains a true copy of such portions of the record as have been designated by appellant and appellee pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, including (in compliance with Paragraph 4 of Rule 12 of said Court) all papers filed under authority of Rule 12 of said Court.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

Received a copy of the above appellant's præcipe for transcript of record this 4th day of September, 1936.

Joseph Triner Corporation, a Corporation, Appellee, by Moses, Kennedy, Stein & Bachrach, Its Attorneys.

The undersigned hereby certifies that the above and foregoing præcipe for transcript of the record is satisfactory to the appellee and the Clerk of the Supreme Court of Illinois is hereby directed to prepare the transcript in accordance with the foregoing.

Joseph Triner Corporation, a Corporation, Appellee, by Moses, Kennedy, Stein & Bachrack.

[fols. 73½ & 74] [File endorsement omitted.]

[fol. 75] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed September 9, 1936

To Joseph Trimer Corporation and Moses, Kennedy, Stein & Bachrach, 231 S. LaSalle Street, Chicago, Illinois, Counsel for Appellee:

Pursuant to Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, we hand you a copy of appellant's præcipe for a transcript of record in the above entitled cause, to be prepared by the Clerk of the Supreme Court of Illinois, the original of which præcipe we shall file with said Clerk of the Supreme Court of Illinois on September 9th, 1936.

Nicholas J. Pritzker, J. Herzl Segal, Stanford Clinton, Attorneys for Appellant.

Received a copy of the above notice and of the appellant's præcipe for transcript of record therein referred to, this 5th day of September, 1936.

Joseph Triner Corporation, a Corporation, by Moses, Kennedy, Stein & Bachrach, Its Attorneys.

[fol. 75½] [File endorsement omitted.]

[fols. 76 & 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] Certificate of transmittal omitted in printing.

[fol. 79] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF THE POINTS ON WHICH HE INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed September 17, 1936

To Honorable Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Washington, D. C.:

Pursuant to Rule 13 Paragraph 9 of the Rules of the Supreme Court of the United States, the appellant comes now

and adopts his assignments of error as his statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Nicholas J. Pritzker, Stanford Clinton, J. Herzl Segal.

Received a copy of the above document this 10th day of September, 1936.

Joseph Triner Corporation, a Corporation, by Moses, Kennedy, Stein & Backrach, Its Attorneys.

[fol. 80] [File endorsement omitted.]

Endorsed on cover: File No. 40,912. Illinois Supreme Court. Term No. 372. Carl W. McNeil, doing business as McNeil's Liquor Store, appellant, vs. Joseph Triner Corporation. Filed September 17, 1936. Term No. 372, O. T., 1936.